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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

SHERYLIN WILLI and SANGEETA PRABHAKAR
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI.

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QUESTIONS PRESENTED

The Fifth Circuit, in an unpublished opinion, affirmed the trial court's grant of summary judgment by adopting a *per se* rule that regular attendance by employees is an essential function of their job. Therefore, by failing to conduct a factual analysis of the record, the trial and appellate courts ignored evidence that the employer selectively withdrew a leave policy made available to its other employees, and failed to engage in an interactive process with petitioners to determine an appropriate accommodation which would allow them to perform the essential function of their position as reservation agents despite their recognized disabilities.

The following questions are presented:

1. Is adoption of a presumption that regular attendance is an essential function of any job consistent with the ADA?

2. Can a determination be made under Rule 56,Fed.R.Civ.P., as a matter of law that an individual is not qualified under the ADA without conducting a factual analysis of the summary judgment record?

LIST OF PARTIES

The parties below are listed in the caption. Merri Wilson was a plaintiff and appellant below, but is not a petitioner herein. Celeste Simon was a defendant and appellee below, but is not a respondent herein.

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OPINION BELOW

The per curiam opinion of the U.S. Court of Appeals for the Fifth Circuit is unpublished, and is reported at 2008 U.S. App. LEXIS 13399 (5th Cir., June 25, 2008). The panel consisted of Justices Reavley, Benavides and Owens, Circuit Judges. *See* Appendix A.

The Fifth Circuit affirmed the decision of the U.S. District Court for the Northern District of Texas (Judge T. Means), reported at 2007 U.S. Dist. LEXIS 41429 (N.D. Tex., June 7, 2007). *See* Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Title 42 U.S.C. § 12101-12117
Americans with Disability Act ("ADA")

Title 29 C.F.R. § 1630.2 (Definitions)
Part 1630: Regulations to Implement the Equal Employment Provisions of the ADA

Title 29 C.F.R. § 1630.9(a) Not Making Reasonable Accommodation
Part 1630: Regulations to Implement the Equal Employment Provisions of the ADA

EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, Number 915.002 (Oct. 17, 2002)

Texas Labor Code Ann. §21.051
Texas Commission on Human Rights Act ("TCHRA")

STATEMENT OF THE CASE

Petitioners Willi and Prabhakar filed their complaint against Respondent American Airlines, Inc. ("American") for damages arising under the FMLA, ADA and TCHRA based on discriminatory treatment by American in eliminating a chronic catastrophic exemption from American's attendance policy for Petitioners, who worked as customer service representatives ("CSRs") in the International Resolution Department ("IRD"), while permitting such exemption to exist in other departments of American's Southern Regional Office ("SRO").

The district court granted summary judgment[1] and entered a final judgment dismissing Respondents' claims with prejudice, taxing costs against Respondents[2]

Appellants timely filed their notice of appeal to the 5th Circuit, which heard oral argument of the appeal on June 3, 2008. In a per curiam opinion, the 5th Circuit affirmed the district court, holding that Petitioners were not qualified individuals under the ADA because regular attendance was an essential

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[1] Appendix B

[2] *Willi v. American Airlines, Inc.*, 2007 U.S. Dist. LEXIS 41429, 154 Lab. L. Rep. (CCH) 35303 (N.D. Tex. June 7, 2007).

function of their position as airline reservation agents.[3]

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[3] The district court also dismissed the claims of Merri Wilson, Plaintiff below, against American and her supervisor, Celeste Simon, for state law defamation and intentional infliction of emotional distress.

REASONS FOR GRANTING THE PETITION

1. REVIEW IS WARRANTED TO RESOLVE CONFLICTS AMONG THE CIRCUIT AND DISTRICT COURTS WHETHER REGULAR ATTENDANCE IS AN ESSENTIAL FUNCTION OF MOST JOBS

A. District Court and 5th Circuit's Analysis

The district court bypassed any analysis whether Petitioners were qualified individuals with a disability by concluding that attendance was an essential function of their position as CSRs in the IRD department. The district court improperly resolved disputed issues of fact, rather than construing the evidence in the light most favorable to Petitioners, the non-moving parties, as required by this Court's decision in *Anderson* v. *Liberty Lobby.*[4]

The 5th Circuit's per curiam opinion, citing prior circuit precedent, held that regular attendance was an essential function of Petitioners' jobs, and that due to their unpredictable absences, they would be unable to meet the essential function of attendance even if American continued to provide CCL to them as an accommodation.

B. Decisions of Other Circuits and District Courts Are In Conflict Regarding Whether Regular Attendance Is An Essential Function under the ADA

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[4] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2548 (1986).

The Fifth Circuit, like many other circuits and district courts, routinely hold that regular attendance is an essential function of most jobs. See, *Riel v. EDS Corp.*, 99 F.3d 678, 683 (5th Cir. 1996).

Other decisions have applied the same rule or presumption in holding that an individual was not qualified under the ADA because regular attendance was an essential function of the position. See, *Jackson v. Veterans Admin.*, 22 F.3d 277, 279 (11th Cir. 1994) (employee not qualified where sporadic, unpredictable absences during probationary employment) *but see, dissent* at 283 (noting sick leave is also unpredictable and irregular). See also, *Brown v. E. Maine Med. Ctr.*, 514 F.Supp.2d 104, 110 n.9 (D. Maine Oct. 15, 2007) (ADA doesn't protect persons with erratic, unexplained absences because no business must tolerate unreliable attendance); *Amato v. St. Lukes Episcopal Hosp.*, 987 F. Supp. 523, 531 (S.D. Tex. 1997) (reasonable accommodation has as inherent prerequisite an employee who reports to work, citing *Jackson*); *Micari v. TWA, Inc.*, 43 F.Supp.2d 275, 281 (E.D.N.Y. 1999) (attendance is prerequisite to performing essential functions of job).

In contrast, other circuits and district court opinions have rejected application of a per se rule or presumption that regular attendance is an essential function of most jobs, and that an employee who has absences caused by a chronic illness is not a qualified individual with a disability under the ADA. The Sixth Circuit in *Cehrs v. NE Ohio Alzheimer's Rsh. Ctr.*, 155 F.3d 775, 782-83 (6th Cir. 1998), rejected such a presumption, and noted that courts applying

such a rule eviscerate "the individualized attention that the [U.S.] Supreme Court has deemed "essential" in each disability claim, citing *School Bd. Of Nassau County v. Arline,* 480 U.S. 273, 287, 94 L.Ed.2d 307, 107 S.Ct. 1123 (1987).

The 6th Circuit pointed out the fallacy that such a presumption bypasses the analysis required by the ADA:

> If we were to presume that uninterrupted attendance in all instances is a mandatory job requirement, then the policies and needs of both the individual employer and employee would never be considered.

155 F.3d at 782. The 6th Circuit also pointed out that the presumption lead to an illogical consequence: it would result in employees with disabilities being treated differently and worse than other employees. *Id.* at 783.

In *John Doe v. Henderson,* 2001 U.S. Dist. LEXIS 25175 (D.D.C. Sept. 10, 2001), the employer argued that the employee's chronic absenteeism rendered him unqualified for the position. The court declined to adopt a *per se* rule in the absence of proof by the employer that the impact of the absences could not be cured with some sort of reasonable accommodation.

To similar effect is the decision in *Dutton v. Johnson County Bd. Of Cty. Comrs.,* 859 F.Supp. 498, 508 (D. Kan. 1994), noting that the employer had not established that the nature of the employee's job is such that regular and predictable attendance is

more critical than for any other job. Moreover, the court found that the employer failed to establish that the unscheduled absences were unduly disruptive to its business, citing Appendix to 29 C.F.R. § 1630.2(o). See also, *Barnett v. Revere Smelting & Refining Corp.*, 67 F.Supp.2d 378, 391 (S.D.N.Y. 1999) (absent a showing by employer that occasional absences make it impossible to perform essential functions of job, absenteeism cannot be a basis for summary judgment).

At least one court has recognized that an employee's lengthy service militates against a finding that the employee was unable to perform the essential functions of her job. See, *Norman .v Southern Guaranty Ins. Co.*, 191 F.Supp.2d 1321, 1335 (M.D. Ala. 2002) (finding fact question for jury to decide).

C. Application of a Per Se Presumption on Regular Attendance is Inconsistent with the ADA and its Implementing Regulations.

The ADA's definition of reasonable accommodation indicates that it may include job restructuring, part time or modified work schedule or reassignment to a vacant position. 29 C.F.R. § 1630.2(o)(2)(ii). The EEOC's regulations make it a violation of the Act not to make reasonable accommodation of an otherwise qualified individual with a disability unless the covered entity demonstrates that the accommodation would impose an undue hardship on its business. 29 C.F.R. § 1630.9(a). The EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, No. 915.002 (Oct. 17, 2002)

states that an employer must allow an employee with a disability to work a modified or part time schedule as a reasonable accommodation absent undue hardship. Importantly, it notes while certain courts have characterized attendance as an "essential function," it is not defined as one under the ADA "because it is not one of "the fundamental job duties of the employment position," citing 29 C.F.R. § 1630.2(n)(1). Rather, essential functions are duties to be performed, citing 29 C.F.R. § 1630.2(n)(2).

Petitioners submit that the granting of their petition is important to resolve the question whether application of a *per se* rule or presumption that regular attendance by an employee is an essential function of their job position is consistent with the ADA's definitions and implementing regulations, and with this Court's decision in *Arline* proscribing an individualized inquiry whether an individual is otherwise qualified with a disability.

Review is also important to resolve the discrepancy in the interpretation of the statute by the circuit and district courts addressing this issue on summary judgment. Petitioners submit that the 5th Circuit's application of the presumption bypasses the required analysis under *Arline,* and is not consistent with the ADA's definitions or implementing regulations.

2. REVIEW IS WARRANTED WHETHER A DETERMINATION CAN BE MADE UNDER RULE 56,FED.R.CIV.P., AS A MATTER OF LAW THAT AN INDIVIDUAL IS NOT QUALIFIED UNDER

THE ADA WITHOUT CONDUCTING A FACTUAL ANALYSIS OF THE SUMMARY JUDGMENT RECORD?

Many of the courts which reject the application of a *per se* presumption that regular attendance is an essential function of most jobs have found that a factual determination must be made by the jury, making summary judgment inappropriate. See, *Ward v. Mass. Heath Rsh. Inst.*, 209 F.3d 29, 35 (1st Cir. 2000) ("[R]esolution...requires a fact-intensive inquiry into the pattern of the attendance problem and the characteristics of the job in question"). Importantly, the court further recognized that nothing in the ADA's definition of reasonable accommodation "implies that a modified work schedule must be regular or predictable"). *Id.* at 36.

The 7th Circuit in *Haschmann v. Time Warner Entertainment Co., LP,* 151 F.3d 591, 602 (7th Cir. 1998), held that consideration of the degree of excessiveness of an employee's absences is a factual issue suited for the jury. Citing the 6th Circuit's opinion in *Cehrs* that no presumption should exist that uninterrupted attendance is an essential job requirement, the district court in *Butka v. J.C. Penney Co., Inc.,* 359 F.Supp.2d 649, 669 (N.D. Ohio 2004), found that an essential issue of fact existed whether the accommodation of a part time schedule would impose an undue hardship on Penney's business. To similar effect is the decision in *Norman v. Southern Guaranty Ins. Co.,* 191 F.Supp.2d 1321, 1335 (M.D. Ala. 2002) (employer's argument that requested accommodation is unreasonable is question for jury); *Barnett v. Revere Smelting &*

Refining Corp., 67 F.Supp.2d 378, 391 (S.D.N.Y. 1999) (absent showing by employer that past or future absences make it impossible for employee to perform essential functions of position, his absenteeism cannot be a basis for summary judgment).

While the district court's opinion recites American's factual evidence of undue hardship, the opinion fails to point out Petitioners' conflicting evidence derived from American's own attendance records for Willi and Prabhakar (cited in Petitioner's brief to the 5th Circuit) demonstrating that their CCL absences were less than other forms of leave they were allowed to take, belying American's argument that their presence was essential to their department's operations. Moreover, neither the district court's opinion or 5th Circuit's per curiam opinion make any reference to Petitioners' evidence (summarized in its briefs submitted to both) that American's management unilaterally decided to eliminate CCL in Petitioner's department, and lied to them about CCL being eliminated on a company-wide basis. Finally, the opinions fail to acknowledge that American's own medical department re-certified Willi and Prabhakar as having eligible chronic illnesses for CCL shortly before management internally decided that they could no longer accommodate such leave.

Like the cases recited herein, it is clear that a determination as a matter of law could not be made based on Petitioners' attendance history that they could not perform the essential functions of their job

as reservation agents. This was a matter for jury determination, not summary judgment.

Thus, granting of the petition is necessary for this Court to further clarify the district court's role in resolving disputed issues of fact as a matter of law on summary judgment.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FILED JUNE 25, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10766

SHERYLIN WILLI; SANGEETA PRABHAKAR; MERRI WILSON

Plaintiffs–Appellants

v.

AMERICAN AIRLINES INC; CELESTE SIMON

Defendants–Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:05-CV-453

Before REAVLEY, BENAVIDES, and OWEN,
Circuit Judges

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

On January 5, 2005, Appellants Sherylin Willi, Sangeeta Prabhakar, and Merri Wilson filed suit against Appellee American Airlines, Inc. ("American"), asserting that American's refusal to grant them chronic catastrophic leave ("CCL")[5] with Disabilities Act ("ADA"), and the Texas Commission on Human Rights Act ("TCHRA").[2] Wilson also asserted claims against Appellee Celeste Simon and American under Texas law for defamation and intentional infliction of emotional distress arising from the publication of a security alert regarding Wilson. American and Simon moved for summary judgment as to all of Appellants' claims, which the district court granted. Appellants now appeal.[3]

Having reviewed the briefs, the record, and the parties' oral arguments under *de novo* review, we AFFIRM the judgment of the district court for the following reasons:

1. We agree with the district court that regular attendance is an essential function of Appellants' positions as reservation agents in the specialized

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[5] CCL allowed an employee with a chronic medical condition, who was not eligible for leave under the Family and Medical Leave Act, to be temporarily exempt from American's attendance policy for each substantiated absence related to the chronic condition.

[2] The ADA and TCHRA both prohibit employment discrimination on the basis of an individual's disability. *See* 42 U.S.C. § 12101-12117; TEX. LAB. CODE ANN. § 21.051. Because the ADA and TCHRA are very similar, Texas courts and this Court focus on federal precedent regarding the ADA in interpreting the TCHRA. *Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 473-74 (5th Cir. 2006).

[3] Appellants do not contest the district court's dismissal of their FMLA claim on appeal.

International Resolutions Desk. *See Hypes v. First Commerce Corp.*, 134 F.3d 721, 727 (5th Cir. 1998) ("[R]egular attendance is an essential function of most jobs."); *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 683 (5th Cir. 1996) (noting that regular job attendance was an obvious essential function). Because CCL would permit Appellants to engage in unpredictable, unapproved, and unscheduled absences, Appellants would still be unable to perform the essential job function of regular attendance even if American were to grant CCL to Appellants as an accommodation. Accordingly, Appellants are not protected by the ADA or TCHRA and cannot prevail on these claims. *See* 42 U.S.C. § 12111(8) (defining "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires").

2. The district court properly dismissed Wilson's defamation claim against Simon and American because Wilson failed to produce any evidence that Simon or American published or directed the publication of the security alert. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) (stating that to maintain a cause of action for defamation, a plaintiff must prove that the defendant published a defamatory statement).

3. Wilson's intentional infliction of emotional distress claim fails because it is based on the exact same allegations as her defamation claim, and "[w]here the gravamen of a plaintiff's complaint is really another tort, intentional infliction of emotional distress should not be available." *Hoffmann-La*

Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004).

AFFIRMED.

APPENDIX B – OPINION OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

DATED AND DECIDED JUNE 7, 2007

SHERYLIN WILLI, SANGEETA PRABHAKAR, AND MERRI WILSON, Plaintiffs VS. AMERICAN AIRLINES, INC. AND CELESTE SIMON, Defendants.

CIVIL ACTION NO. 4:05-CV-453-Y

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

2007 U.S. Dist. LEXIS 41429, 154 Lab. L. Rep. (CCH) 35303

June 7, 2007, Decided
June 7, 2007, Filed

SUBSEQUENT HISTORY: Affirmed by *Willi v. Am. Airlines, Inc., 2008 U.S. App. LEXIS 13399 (5th Cir. Tex., June 25, 2008)*

COUNSEL: [*1] For Sherylin Willi, Sangeeta Prabhakar, Merri Wilson, Plaintiffs: Steven E Clark, LEAD ATTORNEY, The Clark Firm, Dallas, TX.

For American Airlines Inc, Defendant: Melissa M Hensley, LEAD ATTORNEY, Ronald E Manthey, Baker & McKenzie - Dallas, Dallas, TX.

For Celeste Simon, Defendant: Melissa M Hensley, LEAD ATTORNEY, Ronald E Manthey, Sharon F Fulgham, Baker & McKenzie - Dallas, Dallas, TX.

Courtenay Lee Bass, Provider, Pro se, Gilbert Mediation Group, Dallas, TX.

JUDGES: TERRY R. MEANS, UNITED STATES DISTRICT JUDGE.

OPINION BY: TERRY R. MEANS

OPINION

ORDER DENYING MOTION TO STRIKE AND GRANTING MOTION FOR SUMMARY JUDGMENT

Pending before the Court is Defendants' Motion to Strike [doc. # 106], filed February 9, 2007, and Motion for Summary Judgment [doc. # 48], filed October 13, 2006. After consideration, the Court DENIES the motion to strike and GRANTS the motion for summary judgment.

I. BACKGROUND

Plaintiffs Sherylin Willi, Merri Wilson, and Sangeeta Prabhakar worked for defendant American Airlines, Inc. ("American"), in the southern reservations office ("the SRO") of the international resolutions department ("the IRD"). The IRD was a very specialized department that [*2] involved assisting American's reservation agents and international travelers with customer service issues.

The IRD also handled international sales calls, issues relating to American's international frequent-flyer program, and issues regarding the tariff department. Because the reservation offices around the world used different computer reservation programs, employees in the IRD had to be proficient in all the reservation programs. The IRD operated 24 hours a day, 7 days a week.

American had generous leave policies. Among them were employees' ability to change shifts, their ability to "flex" their time during their shifts if they arrived late or needed to leave early, and regular accrual of vacation and sick time. American also established a medical-exemption program for its employees that allowed those with chronic medical conditions, but who were not eligible for leave under the Family Medical Leave Act ("the FMLA"), to have temporary exemptions from American's attendance policy for each substantiated absence related to the chronic condition. In other words, if American certified through the medical-exemption program that an employee's medical condition was chronic, the employee [*3] was exempted from American's attendance policies. In 2000, Willi, who had multiple sclerosis and was no longer eligible for FMLA leave, [1] was approved for chronic catastrophic leave ("CCL") through the medical-exemption program and granted exemptions to the attendance policy.

1 Will had not worked the required 1,250 hours during the prior 12 months.

After September 11, 2001, and in the wake of large financial losses, American began to eliminate jobs, combine desks and functions, and reduce

salaries. The resolution departments were downsized and some functions of the departments were consolidated. As a result, the domestic-resolution department, which handled domestic sales and services, and the Spanish-resolution and executive-platinum departments were eliminated and their duties given to the IRD.

In 2003, defendant Celeste Simon became the manager of the IRD. Soon after assuming her new duties, Simon noticed a high rate of absenteeism, especially on the late-evening shifts, which Willi and Prabhakar worked. [*4] Thus, Simon began to investigate whether employees who were frequently absent should remain in the IRD or should be assigned to a less specialized department that would not be as affected by frequent absences.

Also in 2003, Dr. Thomas Bettes became the medical director of the medical-exemption program. Because of the increasing number of employees seeking attendance exemptions under the medical-exemption program, Dr. Bettes established a uniform method of evaluating medical conditions of employees who claimed to have chronic conditions that interfered with their job duties. Thus, in 2003, employees seeking CCL were asked to certify or re-certify their chronic conditions by providing medical records from the last 12 months and a narrative from their treating doctors. The requests were then reviewed by a medical-review board.

In early 2003, Prabhakar, who suffered from debilitating migraine headaches, applied for CCL. In August 2003, the medical-review board granted Prabhakar exemptions to the attendance policy for absences that were substantiated by her doctor as

related to her migraine headaches. Wilson, who had meningitis, also applied for CCL in 2003. However, the medical-review [*5] board determined that Wilson did not have a medical condition supporting any exemption from the attendance policies. On December 2, 2003, Wilson was told that she would have to handle each subsequent illness through the medical-exemption program, one event at a time. [2]

> 2 Specifically, the letter to Wilson from Dr. Bettes stated that the medical-review board had been [u]nable to assign permanent work restrictions; absences best managed by clearing through AA Medical for each subsequent sick absence." (Defs.' App. at 366.)

In December 2003, the IRD also considered whether it could accommodate Willi's and Prabhakar's permanent work restrictions in the specialized department. Tom Donahue, the managing director of the IRD, determined that it was not operationally feasible to continue their permanent attendance exemptions. On December 22, 2003, Simon sent letters to Willi and Prabhakar stating that their permanent medical restrictions could not be accommodated in their current positions in the IRD "due to [*6] operational requirements." (Plfs.' App. at 285-86.) Simon noted that Willi and Prabhakar had agreed to continue to work "as scheduled and be subject to the Attendance Management Policy." (Plfs.' App. at 285-86.) American offered to move Willi, Prabhakar, and Wilson to less-specialized positions. All three refused the accommodation. (Defs.' App. at 64-65, 106, 167, 318-20.) Although some were available, Willi and Prabhakar did not ask American to conduct a search

for other jobs within the company. (Defs.' App. at 31, 68.) The only accommodation Willi, Prabhakar, and Wilson requested was to be reinstated to CCL and remain in their positions with the IRD. (Defs.'s App. at 105-06.)

Between February 17, 2004, when Wilson returned to full-time shifts in the IRD, and September 28, 2004, Wilson was late to work 53 times. On September 28, 2004, Simon fired Wilson for violations of the attendance policy. Wilson's grievances were denied. Willi and Prabhakar remain employed by the IRD of American.

On January 5, 2005, Willi, Prabhakar, and Wilson filed suit against American arguing that it violated the FMLA, the Americans with Disability Act ("the ADA"), and the Texas Commission on Human Rights [*7] Act ("TCHRA"). Further, Wilson alleged that Simon's actions after Wilson's termination constituted defamation and intentional infliction of emotional distress. American and Simon move for summary judgment. *See FED. R. CIV. P. 56(b).*

II. STANDARD OF REVIEW

Summary judgment is appropriate when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id. 56(c).* The party moving for summary judgment has the initial burden of demonstrating that it is entitled to a summary judgment. *See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* The moving party need not produce evidence showing the absence of an issue of fact with respect

to an issue on which the nonmovant bears the burden of proof, however. Rather, the moving party need only point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmovant's claim. *See id. at 323-25.*

When the moving party has carried its summary-judgment burden, the nonmovant must go beyond the pleadings and by its own affidavits [*8] or by the depositions, answers to interrogatories, or admissions on file set forth specific facts showing that there is a genuine issue for trial. *See FED. R. CIV. P. 56(e).* This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994).* If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

In making its determination on the motion, the Court must look at the full record in the case. *See FED. R. CIV. P. 56(c); Williams v. Adams, 836 F.2d 958, 961 (5th Cir. 1988).* Nevertheless, *Rule 56* "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915-16 & n.7 (5th Cir. 1992).* Instead, parties should "identify specific [*9] evidence in the record, and . . . articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994).*

III. FMLA

American argues that Willi, Prabhakar, and Wilson do not state a viable claim under the FMLA because they were not FMLA eligible. Only eligible employees are entitled to the protections of the FMLA. *See 29 U.S.C.A. § 2612 (West 1999).* An eligible employee is one who has at least 1,250 hours of service during the 12 months before the need for leave. *See 29 U.S.C.A. § 2611(2)(A) (West 1999); Bocalbos v. Nat'l W. Life Ins. Co., 162 F.3d 379, 382-83 (5th Cir. 1998).* Willi, Prabhakar, and Wilson admit that they were not eligible for FMLA leave during the applicable two-year statute of limitations. *See 29 U.S.C.A. § 2617(c) (West 1999).* (Plfs.'s Resp. Br. at 2.) They assert, however, that the medical-exemption program was an extension of American's FMLA program, thereby estopping American from eliminating the medical-exemption program as to Willi, Prabhakar, and Wilson only. But the fact that American [*10] established a policy that defined employee-leave rights more generously than the FMLA does not create an FMLA cause of action. *See Dolese v. Office Depot, Inc., 231 F.3d 202, 203 & n.12 (5th Cir. 2000)* (per curiam); *see also 29 C.F.R. § 825.700(a).* American is entitled to summary judgment as to Plaintiffs' FMLA claim.

IV. ADA AND TCHRA

Both the ADA and the TCHRA prohibit discrimination in employment based on an individual's disability. *See 42 U.S.C.A. § 12101-12117 (West 2005); TEX. LAB. CODE ANN. § 21.051* (Vernon 2006). Because Texas courts rely on

analogous federal precedent when interpreting the TCHRA, this Court will also focus on federal precedents in determining the plaintiffs' claims under the ADA and the TCHRA. *See Rodriguez v. Conagra Grocery Prods. Co., 436 F.3d 468, 473-74 (5th Cir. 2006).*

Under the ADA, it is unlawful for an employer to discriminate against "a qualified individual with a disability because of the disability of such individual in regard to job application procedures[;] the hiring, advancement, or discharge of [*11] employees[;] employee compensation[;] job training[;] and other terms, conditions, and privileges of employment." *42 U.S.C.A. § 12112(a) (West 2005).* The standard to qualify as disabled is "demanding." *Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002).* Thus, to succeed on their ADA and TCHRA claims, Willi, Prabhakar, and Wilson must show that they were qualified individuals with a disability. *See 42 U.S.C.A. §§ 12111(8), 12112(a) (West 2005).*

A qualified individual is one who can perform the essential functions of her job with or without reasonable accommodation. *See id.* Determining whether someone is a qualified individual requires first identifying whether the individual could perform the essential functions of the job and secondly deciding whether any reasonable accommodation by the employer would enable her to perform those functions. *See Chandler v. City of Dallas, 2 F.3d 1385, 1393-94 (5th Cir. 1993).* Factors to be considered in determining whether a function is essential include the employer's judgment, the consequences if the individual [*12] is not required

to perform the function, and the work experience of incumbents. *Hershey v. Praxair, Inc., 969 F. Supp. 429, 434 (S.D. Tex. 1997).* Further, "regular attendance is an essential function of most jobs." *Hypes v. First Commerce Corp., 134 F.3d 721, 727 (5th Cir. 1998); see also Riel v. Elec. Data Sys. Corp., 99 F.3d 678, 683 (5th Cir. 1996).*

American argues that because Willi, Prabhakar, and Wilson cannot perform the essential job function of regular attendance, they are not otherwise qualified individuals under the ADA and TCHRA. Willi, Prabhakar, and Wilson assert that based on American's leave policies and medical-exemption program, American cannot assert that attendance is an essential job function and cannot enforce its attendance policies as to Willi, Prabhakar, and Wilson. This argument is not persuasive. American has proffered evidence that, based on Willi's, Prabhakar's, and Wilson's absences, reservation agents were having to wait too long for assistance and Simon was unable to arrange coverage for their shifts on the specialized desk. [Defs.' App. at 128-29, 548, 564, 568.] Willi, Prabhakar, and Wilson do not [*13] argue that their absences did not affect the department, they merely assert that American's actions estop them from enforcing any attendance policies. Willi, Prabhakar, and Wilson were shift workers, not managers, and their regular attendance was an essential job function. *See Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996); Smith v. Lattimore Materials Co., 287 F. Supp. 2d 667, 671-72 (E.D. Tex. 2003); cf. Conneen v. MBNA Am. Bank NA., 334 F.3d 318, 328 (3d Cir. 2003)* (although holding employer did not offer evidence that punctuality for a manager was

essential job function, court acknowledges that in some circumstances--such as when employer's customer service would be impacted--punctuality is an essential job function). Indeed, the plaintiffs' job descriptions listed reporting to work "in a regular and timely basis" as an "essential job function." [Defs.' App. at 120-21.] Thus, their ADA and TCHRA claims fail because they were not otherwise qualified individuals.

V. DEFAMATION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Wilson asserts that Simon--and American, as Simon's employer--defamed her and [*14] intentionally caused her emotional distress based on a security alert that was issued after Wilson was fired. Specifically, Wilson claims that Simon, based on two unidentified and threatening voice mails she received after firing Wilson, asked that the security company hired by American watch her car because she believed Wilson might try to damage it. The security company issued a security alert, which was given to security personnel, as follows:

> NAME: MERRI WILSON
>
> FORMER SRO EMPLOYEE
>
> Ms. Wilson is a former SRO Employee. Her former Supervisor has reason to believe that Ms. Wilson may want to come on the property to damage her vehicle or enter the building. [3]
>
> If Ms. Wilson is found on property, Officers will politely ask her to leave. If

> she does not comply, contact the Shift Supervisor. (Defs.' App. at 610.)

Although an employee of the security company gave a copy of the security alert to a friend of Wilson who then gave it to Wilson and Willi, the security alert was not seen posted on American's property. (Defs.' App. at 78.)

> 3 American commonly disallowed former employees to return to the property after being fired. (Defs.' App. at 593-94.)

[*15] First, Simon argues that portions of Wilson's summary-judgment evidence supporting her defamation claim should be stricken. Wilson has withdrawn the majority of the disputed evidence. The remaining objectionable evidence will not be stricken based on the arguments Wilson made in her response to Simon and American's motion to strike. (Plf.' s Resp. at 2.) Thus, the motion to strike is DENIED.

To prove defamation, Wilson must show that (1) Simon published a statement, (2) that was defamatory concerning Wilson, (3) while acting with negligence [4] regarding the truth of the statement. *See WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 571 (Tex. 1998).* However, the statements must be statements of fact, not of opinion, to be actionable. *See Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1970); El Paso Times, Inc. v. Kerr, 706 S.W.2d 797, 798 (Tex. App.--El Paso 1986, writ ref'd n.r.e.).* Whether a statement is capable of a defamatory meaning is a question of

law, which is determined by viewing the statement as a whole and in context. *See Musser v. Smith Protective Servs., Inc., 723 S.W.2d 653, 655-56 (Tex. 1987).*

> 4 If Wilson were a public official or public figure, Wilson would have to show that Simon acted with actual malice. *See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); WFAA-TV, 978 S.W.2d at 571.*

[*16] Here, the statement the security company published was merely that Simon "believed" that Wilson "may" try to damage Simon's car or enter the building. These are merely restatements of Simon's unverifiable opinion and are, thus, not actionable. *See, e.g., Columbia Valley Reg'l Med. Ctr. v. Bannert, 112 S.W.3d 193, 199-200 (Tex. App.--Corpus Christi 2003, no pet.).* Further, neither Simon nor American published the statements. [5] A third-party security company published the statements, which is also fatal to Wilson's defamation claim. *See* 20 WILLIAM V. DORSANEO III, *TEX. LITIGATION GUIDE § 333.04[3][a]* (2007).

> 5 Simon contacted the facilities coordinator about her concerns after she received the threatening voice mails. The facilities coordinator passed Simon's concerns on to the security company, which issued the security alert to its employees. (Plfs.' App. at 157-61; Defs.' App. at 593-94.)

Additionally, Wilson's intentional-infliction-of-emotional-distress [*17] claim fails. Intentional

infliction of emotional distress is a very narrowly construed and rare tort that is available only if a plaintiff has no other recognized theory of redress. In other words, if the crux of a plaintiff's complaint is another tort, intentional infliction of emotional distress is an improper claim. *See Hoffmann-La Roche, Inc. v. Zeltwanger, 144 S.W.3d 438, 447 (Tex. 2004); see also Creditwatch, Inc. v. Jackson, 157 S.W.3d 814, 817 (Tex. 2005)* (holding similar post-termination conduct legally insufficient to support intentional-infliction-of-emotional-distress liability). Because the gravamen of Wilson's complaint is defamation, intentional infliction of emotional distress is not cognizable.

VI. CONCLUSION

American is entitled to judgment as a matter of law on the plaintiffs' claims of violations of the FMLA, the ADA, and the TCHRA. Willi, Prabhakar, and Wilson were not eligible employees under the FMLA, and American's medical-exemption program does not create an FMLA cause of action. Regarding the ADA and the TCHRA, Willi, Prabhakar, and Wilson cannot perform an essential function of their jobs--regular attendance--which renders [*18] them not otherwise qualified individuals entitled to the protections of those laws. Finally, Wilson's defamation claim fails because the statement was one of opinion and because the statement was not published by Simon. Her intentional-infliction-of-emotional-distress claim is not cognizable under Texas law. Thus, American and Simon are entitled to summary judgment.

SIGNED June 7, 2007.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE